Darshan Singh Hullan & Anor v Rangasamy a/l Kailasam & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–523 OF 2010
RAMLY ALI, ZAHARAH IBRAHIM AND ABDUL AZIZ ABDUL RAHIM JJCA
2 MAY 2012

Civil Procedure — Appeal — Appeal against judgment of High Court — Transfer of land — Discovery of several third party charges as security for several facilities — Principle of non est factum — Whether sale and purchase agreement designed to mislead — Whether signee exposed to risk of losing land and burden of loaned sum — Whether undue advantage of signee's ignorance about sale purchase transaction occurred — Whether charged disclosed — Whether doctrine of non est factum and fraud successfully proven — Whether learned High Court judge correct in findings

The plaintiff was the registered owner of the piece of land that was the subject matter in the present appeal ('the said land') while the second defendant was a legal firm in which the first defendant was a partner practicing as an advocate and solicitor and a partner in the second defendant. The fourth defendant was a bank. It was alleged that the plaintiff met a director of the third defendant and was told that the third defendant was interested in purchasing the said land and was prepared to purchase the said land for RM550,000. It was alleged that the second defendant, must be used for all documentation necessary for the transfer of the said land. The plaintiff and the third defendant then entered into a sale and purchase agreement and all documentation for the transaction including the preparation of the sale and purchase agreement was done by the first and second defendants. The plaintiff alleged that he was asked to sign several documents which were said to be necessary to complete the said sale and purchase agreement. The plaintiff pleaded and gave evidence that he was uneducated and could not speak English or Bahasa Malaysia fluently and did not have any knowledge of any formalities required under the said sale and purchase agreement. The plaintiff contended that he relied solely on the first and second defendants to give him advice and to carry out all the work with honesty and perfection. Pursuant to the said sale and purchase agreement, the third defendant paid RM140,000 to the plaintiff but it was alleged that the third defendant did not make other payments or refused/failed/neglected in making any other payment under the said sale and purchase agreement; and that the said sale and purchase agreement was never concluded by both parties. The plaintiff further averred that he later received a letter of demand letter from Tetuan Soo Thien Ming & Nashrah, representing the fourth defendant, demanding payment for the sum of approximately RM765,497.97 inclusive of

interest as of November 2000 in respect of the facilities purportedly granted to the third defendant by the fourth defendant. From the said letter, the plaintiff discovered that the said land had been subjected to several third party charges to the fourth defendant as security for several facilities given to the third defendant by the fourth defendant. The plaintiff further argued that the fourth defendant had applied to the Land Administrator Klang for an order of sale under s 260(2) of the National Land Code in respect of the said land and claimed RM765,497.97 from the plaintiff based on the documents and the agreement purportedly entered into by the plaintiff or with the plaintiff's consent. The fourth defendant had registered the first and second charge at Klang Land Office. It was alleged that at all material times the first and second defendant had acted as solicitors or agents for the fourth defendant for the registration of the charge and the preparation of the loan facility agreement. Meanwhile, the third defendant through the first and second defendants had entered, allegedly wrongfully, a private caveat on the said land. In his pleaded case, the plaintiff had grounded his claim on the ground of the doctrine of *non est factum* and fraud. The plaintiff's claim was allowed. The learned trial judge found that the sale and purchase agreement was designed to mislead the plaintiff into believing that it was a sale and purchase transaction and exposed the plaintiff to the risk of losing the land and the burden of the loaned sum. The learned High Court judge also found that the first defendant (and vicariously the second defendant) had taken advantage of the plaintiff's ignorance about the sale purchase transaction and had not disclosed the fact of the charges. Dissatisfied, the first and second defendants appealed against the said decision. The issue that arose in the present appeal was whether the plaintiff had successfully proved his case on the doctrine of *non est factum* and also on fraud; and whether the learned High Court judge was correct in his findings.

Held, dismissing the appeal with costs:

(1) The issue in the present appeal was the credibility of the witnesses that had given evidence before the trial judge and supported by the contemporaneous documentary evidence. This case was very much determined by the credibility of the witnesses' testimonies because the narration of the events by the plaintiff and the first defendant were completely opposite. The learned trial judge had the advantage of seeing and observing the demeanour of the key witnesses giving evidence. The trial judge was in a better position to assess the credibility of the witnesses. The learned trial judge had made a finding that he believed and preferred the plaintiff's version to that of the defendants and the court must respect that finding and should be slow to disturb it. On the facts and circumstances of this case, the learned trial judge was justified in his assessment and conclusion of the facts and the credibility of the witnesses (see para 54).

(2) It is settled law that fraud in civil cases has to be proved beyond reasonable

doubt and the party to prove it is the party that asserts fraud. On the totality of evidence in this case, the plaintiff had discharged that burden. The issue of fraud was interwoven with the plea of *non est factum*. On the evidence, the plaintiff was, at the time he signed the documents relating to the charges, mistaken as to their character thinking that the documents he signed were necessary for the purpose of the sale and purchase agreement of the land as told to him by the first defendant. Thus, the court agreed with the learned trial judge's conclusion that the plaintiff had successfully proved the plea of *non est factum*. The plaintiff's mind was not addressed to the character and the specific nature of the documents relating to the charges that he was asked to sign (see paras 58–59).

[Bahasa Malaysia summary

Plaintif merupakan pemilik berdaftar sebidang tanah yang menjadi hal perkara dalam rayuan ini ('tanah tersebut') manakala defendan kedua merupakan sebuah firma guaman yang mana defendan pertama adalah rakan kongsi yang beramal sebagai seorang peguambela dan peguamcara dan juga rakan kongsi dalam defendan kedua. Defendan keempat adalah bank. Adalah didakwa bahawa plaintif telah bertemu dengan seorang pengarah defendan ketiga dan telah dimaklumkan bahawa defendan ketiga berminat dan telah bersedia untuk membeli tanah tersebut dengan jumlah RM550,000. Adalah juga didakwa bahawa khidmat defendan kedua, mesti digunakan untuk kesemua dokumentasi yang perlu untuk pindah milik tanah tersebut. Plaintif dan defendan ketiga kemudiannya memasuki perjanjian jual beli dan kesemua dokumentasi bagi transaksi tersebut termasuk penyediaan perjanjian jual beli dilakukan oleh defendan pertama dan kedua. Plaintif mendakwa bahawa dia diminta untuk menandatangani beberapa dokumen yang dikatakan perlu untuk melengkapkan perjanjian jual beli tersebut. Plaintif memplidkan dan mengemukakan keterangan bahawa dia tidak berpendidikan dan tidak boleh bertutur dalam Bahasa Inggeris atau Bahasa Malaysia dengan lancar dan tidak mempunyai sebarang pengetahuan tentang apa-apa formaliti yang dikehendaki di bawah perjanjian jual beli tersebut. Plaintif menghujahkan bahawa dia bergantung sepenuhnya dengan defendan pertama dan kedua untuk memberinya nasihat dan untuk menjalankan semua kerja-kerja dengan jujur dan sempurna. Berikutan perjanjian jual beli tersebut, defendan ketiga membayar RM140,000 kepada plaintif tetapi adalah didakwa bahawa defendan ketiga tidak membuat pembayaran lain atau enggan/gagal/cuai dalam membuat apa-apa bayaran lain di bawah perjanjian jual beli tersebut dan bahawa perjanjian jual beli tersebut tidak pernah dimeterai oleh kedua-dua pihak. Plaintif selanjutnya menegaskan bahawa dia kemudian menerima surat surat tuntutan daripada Tetuan Soo Thien Ming & Nashrah, mewakili defendan keempat, menuntut bayaran bagi jumlah RM765,497,97 termasuk faedah sejak November 2000 bagi kemudahan yang kononnya diberikan kepada defendan ketiga oleh defendan keempat. Berdasarkan surat tersebut,

plaintif mendapati bahawa tanah tersebut tertakluk kepada beberapa pajakan pihak ketiga kepada defendan keempat sebagai cagaran untuk beberapa kemudahan yang diberikan kepada defendan ketiga oleh defendan keempat. Plaintif seterusnya menghujahkan bahawa defendan keempat telah memohon kepada Pentadbir Tanah Klang untuk mendapatkan suatu perintah jualan di bawah s 260(2) Kanun Tanah Negara bagi tanah tersebut dan menuntut RM765,497,97 daripada plaintif berdasarkan dokumen dan perjanjian yang kononnya dimeterai oleh plaintif atau dengan keizinan plaintif. Defendan keempat telah mendaftarkan pajakan pertama dan kedua di Pejabat Tanah Klang. Adalah didakwa bahawa pada kesemua masa material defendan pertama dan kedua telah bertindak sebagai peguam atau ejen defendan keempat bagi pendaftaran pajakan dan penyediaan perjanjian kemudahan pinjaman. Sementara itu, defendan ketiga melalui defendan pertama dan kedua telah memasukkan, didakwa secara haram, kaveat persendirian ke atas tanah tersebut. Dalam kes yang diplidkan, plaintif telah mengasaskan tuntutannya ke atas tanah tersebut berdasarkan doktrin *non est factum* dan penipuan. Tuntutan plaintif dibenarkan. Hakim bicara mendapati bahawa perjanjian jual beli telah dibentuk untuk mengelirukan plaintif ke arah mempercayai bahawa ia adalah transaksi jual beli dan mendedahkan plaintif kepada risiko kehilangan tanah dan beban jumlah yang dipinjamkan. Hakim Mahkamah Tinggi juga mendapati bahawa defendan pertama (dan secara vikarius, defendan kedua) telah mengambil kesempatan terhadap kejahilan plaintif mengenai transaksi jual beli dan telah tidak mendedahkan fakta mengenai pajakan tersebut. Tidak berpuas hati, defendan pertama dan kedua merayu terhadap keputusan tersebut. Isu yang timbul dalam rayuan ini adalah sama ada plaintif telah berjaya membuktikan kesnya berdasarkan doktrin *non est factum* dan penipuan; dan sama ada hakim Mahkamah Tinggi tepat dalam dapat-dapatannya.

Diputuskan, menolak rayuan dengan kos:

(1) Isu dalam rayuan ini adalah kredibiliti saksi-saksi yang telah memberi keterangan di hadapan hakim bicara dan disokong oleh bukti-bukti dokumentari. Kes ini ditentukan oleh kredibiliti testimoni saksi-saksi kerana perihalan kejadian-kejadian oleh plaintif dan defendan pertama sama sekali bertentangan. Hakim bicara mempunyai kelebihan melihat dan memerhatikan perilaku saksi-saksi utama yang memberikan keterangan. Hakim bicara dalam kedudukan yang lebih baik untuk menilai kredibiliti saksi-saksi. Hakim bicara telah membuat dapatan bahawa beliau mempercayai dan lebih cenderung kepada versi plaintif berbanding defendan dan mahkamah mestilah menghormati dapatan tersebut dan tidak terburu-buru untuk campur tangan. Berdasarkan fakta dan hal keadaan kes ini, hakim bicara bertindak wajar dalam penilaian dan kesimpulan fakta dan kredibiliti saksi-saksi (lihat perenggan 54).

(2) Adalah menjadi undang-undang mantap bahawa penipuan dalam kes sivil hendaklah dibuktikan melampaui keraguan yang munasabah dan pihak yang hendak membuktikannya adalah pihak yang menegaskan penipuan tersebut. Berdasarkan keseluruhan keterangan dalam kes ini, plaintif telah melepaskan beban tersebut. Isu penipuan telah dikaitkan dengan pli *non est factum*. Berdasarkan keterangan, plaintif, ketika dia menandatangani dokumen-dokumen pajakan, tersalah anggap akan sifat mereka, beranggapan bahawa dokumen-dokumen yang ditandatanganinya dikehendaki bagi maksud perjanjian jual beli tanah seperti yang dimaklumkan kepadanya oleh defendan pertama. Oleh itu, mahkamah bersetuju dengan kesimpulan bahawa plaintif telah berjaya membuktikan pli *non est factum*. Minda plaintif tidak diarahkan kepada sifat tertentu dokumen-dokumen pajakan yang mana dia telah diminta untuk menandatangani (lihat perenggan 58–59).]

Notes

For cases on appeal against judgment of High Court, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 800–803.

Cases referred to

Fusing Construction Sdn Bhd v Eon Finance Bhd & Ors [2000] 3 MLJ 95; [2000] 3 CLJ 341, CA (refd)

Gallie v Lee and Another [1969] 1 All ER 1062, CA (refd)

Kiong Man v Kishen [1971] 1 MLJ 54 (folld)

Lii Tat Credit & Mortgage Sdn Bhd v Tang Liing Kang [1988] 3 MLJ 104, HC (folld)

Lim Chee Holdings Sdn Bhd v RHB Bank Bhd (formerly known as Kwong Yik Bank Bhd) [2005] 6 MLJ 497; [2005] 4 CLJ 305, CA (refd)

Saunders (Executrix of the estate of Rose Maud Gallie (deceased) v Anglia Building Society (formerly Northampton Town and County Building Society) [1970] 3 All ER 961, HL (refd)

Soo Boon Siong @ Saw Boon Siong v Saw Fatt Seong and Soo Hock Seang (as estate representative Soo Boon Kooi @ Saw Boon Kooy (deceased)) & Ors [2008] 1 MLJ 27; [2008] 1 CLJ 365, CA (refd)

Legislation referred to

Banking and Financial Institutions Act 1989
Companies Act 1965
National Land Code s 260(2)

Appeal from: Civil Suit No S7–22–17 of 2002 (High Court, Kuala Lumpur)

Harpal Singh Grewal (Andrew Khoo and Reny Rao with him) (Khoo & Sidhu) for the appellants.
Muhammad Rafique (Sivaraja & Co) for the first respondent.

Ng Ka Choon (Soo Thien Ming & Nashrah) for the second respondent.

Abdul Aziz Abdul Rahim JCA (delivering judgment of the court):

[1] On 29 January 2010 the learned High Court judge at Kuala Lumpur allowed the first respondent's claim for a sum of RM410,000, interest and costs against the first and second appellants. In his judgment the learned High Court judge ordered the appellants to jointly and severally pay the first respondent special damages in the sum of RM410,000 which was the amount outstanding from the third defendant (not a party in this appeal) to the first respondent under the sale and purchase agreement dated 27 January 1999. The learned judge also ordered that the first respondent was not liable to pay the outstanding amount under the charge documents to the second respondent (who is the fourth defendant in the High Court).

[2] Not satisfied with the decision, the first and second appellants appeal to this court against that decision.

[3] For convenience, in this appeal the appellants will be referred to as the first and second defendants and the first and second respondents as the plaintiff and the fourth defendant respectively.

[4] The third defendant is a private limited company but not a party to this appeal.

BACKGROUND FACTS

[5] The plaintiff's pleaded case is as follows:

[6] At all material time the plaintiff was the registered owner of a piece of land known as Lot No 4579, No GM 2357, Mukim Kapar, Daerah Klang, Selangor Darul Ehsan ('the said land').

[7] The second defendant is a legal firm with an address at No 1, Jalan Perkasa 8, Taman Maluri, Cheras, 55100 Kuala Lumpur. The first defendant is a practising advocate and solicitor and a partner in the second defendant.

[8] The third defendant is a private limited company incorporated under the Companies Act 1965 and having a registered address at No 28-1, Jalan Mewah 2/2B, Regalia Business Centre, Subang Jaya, 47500 Selangor Darul Ehsan.

[9] The fourth defendant is a licensed bank under the BAFIA (Banking and Financial Institutions Act 1989) and was incorporated under the Companies Act 1965.

[10] The plaintiff averred that sometime in early 1999 the plaintiff met a director of the third defendant and was told that the third defendant was interested to purchase the said land. It was further averred that the said director of the third defendant stated that the third defendant was prepared to purchase the said land for RM550,000 and that the legal firm of Tetuan Darshan Chong & Co, ie the second defendant, must be used for all documentation in respect of the transfer of the said land. Accordingly, on 27 January 1999, the plaintiff and the third defendant entered into a sale and purchase agreement (exh P1) whereby the plaintiff agreed to sell and the third defendant agreed to buy the said land. It is disputed that all documentation in respect of the transaction including the preparation of the sale and purchase agreement was done by the first and second defendants.

[11] The plaintiff alleged that while he was at the firm of the second defendant, he was asked to sign several documents which were said to be necessary to complete the said sale and purchase agreement. The plaintiff pleaded and gave evidence at the trial that he is uneducated and could not speak English or Bahasa Malaysia fluently and does not have any knowledge of any formalities required under the said sale and purchase agreement. The plaintiff contended that he relied solely on the first and second defendants to give him advice and to carry out all the work with honesty and perfection.

[12] Pursuant to the said sale and purchase agreement, the third defendant paid a sum of RM140,000 to the plaintiff. But, after that the plaintiff alleged that the third defendant did not make any other payment or have refused or failed or neglected in making any other payment under the said sale and purchase agreement; and that the said sale and purchase agreement was never concluded by both parties.

[13] The plaintiff further averred that on 2 November 2000, he received a demand letter from the legal firm of Tetuan Soo Thien Ming & Nashrah representing the fourth defendant. From the said letter, the plaintiff discovered that the said land had been subjected to several third party charges to the fourth defendant as security for several facilities given to the third defendant by the fourth defendant. The demand letter from the legal firm of Soo Thien Ming demanded payment for the sum of approximately RM765,497.97 inclusive of interest as of November 2000 in respect of the facilities purportedly granted to the third defendant by the fourth defendant.

[14] The plaintiff further averred that the fourth defendant had applied to

the Land Administrator Klang for an order of sale under s 260(2) of the National Land Code in respect of the said land and claimed from the plaintiff for the sum of RM765,497.97 based on the documents and the agreement purportedly entered into by the plaintiff or with the plaintiff's consent. These documents include: (a) a facility agreement dated 2 March 1999 between the third and fourth defendants whereby the fourth defendant agreed to grant a loan facility of RM750,000 to the third defendant and that the plaintiff in the said facility agreement was named as the chargor for the said land; (b) *Borang Gadaian 16A* dated 2 March 1999 for first and second charges over the said land to the fourth defendant as security for loan facilities to the third defendant for the sum of RM365,000 and RM385,000 respectively; (c) annexure to the *borang gadaian pertama dan gadaian kedua* whereby the plaintiff was said to have agreed to the charge and also have agreed to make payment for the facilities granted to the third defendant if demanded by the fourth defendant.

[15] The fourth defendant had on 5 March 1999, vide Presentation No 770/99 Folio 29 and Presentation No 771/99 Folio 30 registered the first and second charge respectively at Klang Land Office. It was alleged that at all material times the first and second defendants had acted as solicitors or agents for the fourth defendant with respect to the registration of the charge and the preparation of the loan facility agreement.

[16] Meanwhile, the third defendant through the first and second defendants had on 13 July 1999 entered, allegedly wrongfully, a private caveat *Jilid* No 133 Folio 25 on the said land.

[17] The plaintiff in his pleaded case had grounded his claim on the ground of the doctrine of *non est factum* and fraud.

[18] As to the claim of the *non est factum*, the plaintiff has in para 23 of his statement of claim (at pp 38–39 of the appeal record *Jilid* 1) particularised the grounds as follows:

(a) Defendan pertama dan/atau defendan kedua dan/atau ejen-ejen, pekerja-pekerjanya dan/atau pihak-pihak lain tidak memberi sebarang penjelasan atau penerangan kepada plaintif mengenai dokumen-dokumen tersebut dan tujuan dokumen-dokumen tersebut;

(b) Plaintif adalah buta-huruf dan tidak mempunyai pemahaman bahasa Inggeris dan bahasa Malaysia;

(c) Plaintif telah bergantung kepada defendan pertama dan defendan kedua sebagai pakar dalam undang-undang, professional dan mempunyai kewajipan fidusiari (fiduciary duty) terhadap plaintif pada setiap masa material;

(d) Plaintif telah menandatangani dokumen-dokumen di atas representasi

(yang salah) yang dibuat oleh defendan pertama, defendan kedua, defendan ketiga dan/atau agen-agen mereka bahawa dokumen-dokumen tersebut diperlukan untuk ditandatangani untuk tujuan perjanjian jual-beli tanah tersebut;

(e) Plaintif tidak pernah berniat atau bersetuju untuk menggadai tanah tersebut kepada defendan keempat sebagai sekuriti untuk pinjaman kepada defendan ketiga, Plaintif tidak mempunyai sebarang kepentingan di syarikat defendan ketiga;

(f) Plaintif tidak mempunyai sebarang pengetahuan mengenai prosedur yang diperlukan dan dokumen-dokumen yang harus ditandatangani untuk kerja-kerja jual-beli tanah dan telah bergantung kepada nasihat defendan pertama, defendan kedua dan/atau egen-egennya.

[19] As to the claim of fraud by the first and second defendants, the plaintiff in para 25 of his statement of claim (at pp 39–42 of the appeal record *Jld* 1) listed the particulars of fraud as follows:

(a) Telah memberitahu plaintif secara salah bahawa dokumen-dokumen yang ditandatangani tersebut adalah untuk tujuan dibawah perjanjian jual-beli tersebut walaupun mengetahui sepenuhnya bahawa dokumen-dokumen tersebut adalah untuk gadaian dan bukannya untuk tujuan di bawah perjanjian jual-beli;

(b) Mengetahui atau mempercaya bahawa plaintif adalah buta-huruf dan tidak memahami bahasa Inggeris dan bahasa Malaysia, dan telah mengambil kesempatan untuk membuat representasi palsu bahawa dokumen-dokumen tersebut adalah diperlukan untuk tujuan di bawah perjanjian jual-beli tersebut;

(c) Telah menggadai tanah tersebut kepada defendan keempat untuk tujuan sebagai sekuriti kepada pinjaman-pinjaman dan kemudahan-kemudahan yang diberi oleh defendan keempat kepada defendan ketiga walaupun berpengetahuan, bahawa Plaintif tidak berniat untuk menggadai tanah tersebut;

(d) Telah memberi representasi secara salah kepada defendan keempat secara terus dan/atau secara sirat bahawa Plaintif telah bersetuju untuk menggadai tanah tersebut kepada defendan keempat walaupun mengetahui sebaliknya;

(e) Defendan Pertama telah secara fraud dan salah telah mengaku di borang-borang gadaian (Borang 16A) bahawa Plaintif telah menyempurnakan suratcara tersebut dengan sukahatinya dan telah faham akan kandungan suratcara itu dan natijahnya walaupun mengetahui ia adalah tidak benar;

(f) Defendan pertama telah secara fraud dan salah mengaku di borang-borang gadaian (Borang 16A) bahawa plaintif telah menandatangani dokumen-dokumen tersebut di hadapannya;

(g) Telah menyempurnakan semua dokumen-dokumen lain dan melakukan semua formaliti yang perlu untuk menggadaikan tanah tersebut walaupun berpengetahuan bahawa plaintif tidak berniat untuk menggadaikan tanah tersebut;

(h) Memasuki kaveat pada 13hb Julai 1999 bagi defendan ketiga walaupun mengetahui bahawa Perjanjian Jual-Beli tersebut telah tidak diteruskan oleh kedua-dua pihak apabila tanah telah digadai kepada defendan keempat;

(i) Telah mengetahui bahawa plaintif tidak berniat, tidak akan bersetuju dan tidak pernah memberi arahan untuk tanah tersebut digunakan untuk gadaian kepada defendan keempat sebagai sekuriti kepada pinjaman-pinjaman ke Defendan Ketiga;

(j) Telah bersubahat dengan Defendan Ketiga untuk menggadaikan tanah Plaintif kepada defendan keempat;

(k) Telah secara palsu menyebabkan defendan keempat memberi pinjaman dan kemudahan-kemudahan lain kepada defendan Ketiga di atas sekuriti gadaian tanah Plaintif walaupun mengetahui bahawa Plaintif tidak bersetuju untuk tanahnya digadaikan;

(l) Tidak pernah memberitahu plaintif bahawa tanah tersebut telah digadaikan kepada defendan keempat di atas pinjaman yang diberi olehnya kepada defendan ketiga;

(m) Memberi milikan dokumen hakmilik kepada defendan keempat;

(n) Gagal memberi nasihat kepada plaintif untuk mendapat nasihat bebas (independent advise) dan meletakkan dirinya (iaitu defendan pertama dan defendan kedua) di dalam keadaan percanggahan kepentingan (conflict of interest) dengan defendan ketiga kerana telah bertindak sebagai peguamcara bagi kesemua pihak (iaitu Plaintif, defendan ketiga dan defendan keempat);

(o) Telah gagal mengambil langkah-langkah yang sewajarnya untuk memastikan bahawa plaintif diberi nasihat dalam bahasa Tamil atau bahasa yang boleh difahami apakah effect dan tujuan dokumen-dokumen yang ditandatangani oleh plaintif;

(p) Telah mendapat keuntungan untuk dirinya atau/dan bagi pihak lain;

(q) Menyebabkan plaintif kerugian.

[20] As to the claim of fraud by the third defendant, the plaintiff states (at pp 42–43 of the appeal record *Jilid* 1) the particulars as follows:

(a) Bersubahat dengan defendan pertama dan kedua untuk menggadai tanah tersebut kepada defendan keempat, walaupun mengetahui atau mempercayai bahawa plaintif tidak pernah bersetuju atau berniat menggadai tanah tersebut untuk pinjaman-pinjaman dan kemudahan-kemudahan lain yang diberi kepada defendan Ketiga;

(b) Menerima wang dan kemudahan-kemudahan lain dari defendan keempat dengan pengetahuan atau kepercayaan bahawa plaintif tidak berniat atau memberi persetujuan untuk tanah tersebut digadaikan kepada defendan keempat;

(c) Menandatangani borang-borang gadaian dan perjanjian-perjanjian lain dengan plaintif dengan kepercayaan dan/atau pengetahuan bahawa borang-borang dan perjanjian-perjanjian tersebut akan digunakan dengan tujuan untuk menyebabkan defendan keempat melepaskan pinjaman kepadanya;

(d) Memasuki kaveat terhadap tanah tersebut walaupun mengetahui atau mempercayai bahawa perjanjian jual-beli telah tidak disempurnakan oleh kedua-dua pihak (iaitu plaintif dengan defendan ketiga);

(e) Mengetahui atau mempercayai bahawa plaintif adalah buta-huruf dan tidak mempunyai pemahaman bahasa Inggeris dan bahasa Malaysia dan telah mengambil kesempatan untuk mendapatkan tandatangan untuk dokumen-dokumen gadaian dan dokumen-dokumen lain;

(f) Membuat percubaan untuk mendapatkan pinjaman selanjutnya dari Malayan Banking Berhad yang menyebabkan bank tersebut memasukkan kaveat pada 2.5.2000 di atas tanah tersebut.

THE DEFENCE

[21] In their amended defence (undated) (at pp 53–63 of the appeal record *Jilid* 1), the first and second defendants averred that they received instructions from the third defendant to prepare the sale and purchase agreement and had never represented or acted for the plaintiff in the sale and purchase of the said land.

[22] The first and second defendants also averred that on or about 25 January 1999 when the plaintiff came to the second defendant's office, the plaintiff signed only the sale and purchase agreement dated 27 January 1999 and an undated *Borang 14A* for the transfer of the said land and no other documents.

[23] The first and second defendants also denied any knowledge of any payment of RM140,000 to the plaintiff by the third defendant or of non-payment of the balance of the purchase price by the third defendant to the plaintiff.

[24] The first and second defendants also denied that the plaintiff had never charged the said land to the fourth defendant. The first and second defendants further averred that they were instructed by the fourth defendant as to a facility (loan) given to the third defendant and that as security for the said loan a third

party charge was to be entered on the plaintiff's land; and acting on those instructions, the first and second defendants proceeded to prepare the necessary documents.

[25] The first and second defendants contended that at all material times the plaintiff and the fourth defendant were aware of the intentions, circumstances and interest of the loan documents executed by them. The first and second defendants alleged that the plaintiff had executed the loan documents in the presence of the first defendant and one Miss Saran Kaur, a worker in the second defendant's firm. As such the first and second defendants said that the principles of *non est factum* do not apply in this case. They also deny any allegation of negligence on their part in the transactions in question.

FINDINGS OF THE HIGH COURT AFTER FULL TRIAL

[26] The findings by the High Court are based primarily on the testimonies of the witnesses who have given evidence in this case and the documentary evidence produced at the trial and also on the assessment of the credibility of the witnesses by the learned trial judge. On this basis the learned trial judge found that the sale and purchase agreement (exh P1) was designed to mislead the plaintiff into believing that it was a sale and purchase transaction when the first defendant had used exhs P2–P5 to charge the land and exposed the plaintiff to the risk of losing the land and the burden of the loaned sum. The learned High Court judged reasoned as follows:

> Walhal jika plaintiff berhasrat untuk mendapatkan wang melalui gadaian beliau boleh berbuat demikian sendiri dan tidak perlu perjanjian jual beli. Tidak mungkin seseorang yang ingin menjual tanahnya dengan harga RM550,000.00 telah memasuki gadaian dengan mana pembeli menerima wang pinjaman dari gadaian lebih banyak dari tanah yang sama dan membayar hanya RM140,000.00 kepada penjual dan penjual yang menanggung beban gadaian dengan bank (pp 21–21 of the appeal record *Jilid* 1).

[27] The learned High Court judge also found that the first defendant (and vicariously the second defendant) had taken advantage of the plaintiff's ignorance about the sale purchase transaction and had not disclosed the fact of the charges. The learned judge made a finding of fact that the plaintiff did not understand what he was signing on exhs P2, P3, P4 and P5. The learned judge says, in his judgment, as follows:

> Mahkamah memutuskan plaintiff tidak memahami apa yang ditandatansan pada P2, P3, P4 dan P5. Mahkamah mendapati bahawa plaintiff berjaya membuktikan pemakaian prinsip non est factum. Mahkamah lebih mempercayai plaintiff dan telah melihat beliau memberi keterangan. Defendan Pertama bersama-sama menghalang defendan ketiga berbuat demikian, malah defendan keempat sendiri bergantungan sepenuhnya untuk menghalang defendan ketiga berbuat demikian,

malah defendan keempat sendiri bergantungan sepenuhnya kepada defendan pertama dan defendan kedua memandangkan segala tandatangan dan kefahaman plaintiff dipikul oleh defendan pertama dan defendan kedua secara bersama bukannya oleh defendan ketiga atau keempat (pp 22–23 of the appeal record *Jilid* 1).

THIS APPEAL

[28] The issue in this appeal therefore is whether the plaintiff had successfully proved his case on the doctrine of *non est factum* and also on fraud; a corollary to that is whether the learned High Court judge was correct in his findings.

[29] Before we address the issue, a brief statement of the law on *non est factum* would be helpful.

[30] The burden to prove a plea of *non est factum* is on the plaintiff; and it must be strictly proved.

[31] In *Gallie v Lee and Another* [1969] 1 All ER 1062 Lord Russel LJ of the English Court of Appeal said that proof of a plea of *non est factum* requires a strong and clear evidence. It must also be shown that the document the plaintiff signed is of a different character or nature from the one that the plaintiff intended to execute. It also appears from the judgment of Lord Salmon LJ in the same case that, to establish the plea of *non est factum*, a plaintiff must show that had he or she known the true character and class of the document that he signs he or she would not have executed it and that neither a mistaken belief as to the reason for executing the document nor the identity of the parties named in the document could amount to a mistake as to the character or class of a document for the purpose of a plea of *non est factum*.

[32] In *Saunders (Executrix of the estate of Rose Maud Gallie (deceased) v Anglia Building Society (formerly Northampton Town and County Building Society)* [1970] 3 All ER 961 (HL), it was said that though the plea is not confined to the blind and illiterate, a plea of *non est factum* can rarely be established by a person of full capacity; and any extension of the scope of the plea would be kept within narrow limits.

[33] The above principles have been followed by our courts: *Kiong Man v Kishen* [1971] MLJ 54 and *Lii Tat Credit & Mortgage Sdn Bhd v Tang Liing Kang* [1988] 3 MLJ 104.

[34] The plaintiff did not deny that he had entered into a sale and purchase agreement with the third defendant in respect of the said land. But he

categorically denies charging the said land to any financial institution either for his own benefit or for any other parties benefit. This was stated very clearly in the plaintiff's solicitor letter dated 1 October 2001 to the second defendant (at p 295 of the appeal record *Jilid* 4 — exh P8) seeking clarification on the matter as the second defendant had prepared the said sale and purchase agreement. A paragraph in the said letter reads:

> Our client emphatically and unreservedly denies charging the above said property to any financial institution for his nor any other parties benefit, and insists that he only agreed to sell the abovesaid property to the purchaser, company and the transaction had been finally abandoned.

[35] Soon after the said letter was sent (by hand and on urgent basis) to the second defendant, the plaintiff had on 5 October 2001 lodged a police report at Balai Polis Klang Selangor (exhibited at p 288 of the appeal record *Jilid* 4 — exh P7). In his police report the plaintiff stated in no uncertain terms that he never give any instruction to the second defendant to charge the said land, nor did he ever charged or gave consent to charge the said land.

[36] We noted however the plaintiff's solicitor letter of 1 October 2001 to the second defendant was sent almost one year after the plaintiff received a letter of demand from the fourth defendant's solicitors and which letter was dated 2 November 2000 (at p 281 of the appeal record — exh P6). There was no explanation by the plaintiff in his examination in chief for this delay in writing P8 to the second defendant; and the first and second defendants' also did not make an issue of this delay in the cross-examination of the plaintiff. However upon perusal of the notes of proceedings in this case, we noted that the delay in writing P8 could have been attributed to the fact that prior to engaging the firm of Sivaraja & Co to act for him in the matter, the plaintiff had engaged the services of the legal firm of Tetuan RV Lingam & Co, who on 2 November 2000 wrote to the solicitors for the fourth defendant Ms Soo Thien Ming & Nashrah referring to a copy of the fourth defendant's demand notice to the plaintiff dated 3 October 2000 and informing the fourth defendant's solicitors that the plaintiff was in the process of selling the said land to a prospective purchaser and intended to redeem the said land; and requesting the fourth defendant to withhold any further action on the matter. The letter by Tetuan RV Lingam & Co (at p 302 of the appeal record) also requested the fourth defendant to forward to the solicitors' firm the redemption statement for a period of three months stating the actual amount by owed by the plaintiff.

[37] Under cross-examination, the plaintiff did not deny engaging the services of RV Lingam & Co initially. However, the plaintiff testified that he engaged the legal firm of Tetuan RV Lingam & Co to investigate the matter as he wanted to know further details of the loan. But in his answer in

cross-examination on this issue the plaintiff categorically denied giving any instruction to Tetuan RV Lingam to write the letter of 2 November 2000 to the fourth defendant's solicitors on the matters stated above. The plaintiff testified that he was not aware of the letter written by RV Lingam & Co and denied its content saying that it is inaccurate.

[38] With regard to the letter, we noted that the letter was dated 2 November 2000, the same date as the letter (exh P6) by the fourth defendant's solicitors to the plaintiff and in its letter Tetuan RV Lingam & Co referred to the fourth defendant's notice of demand dated 3 October 2000. There is no notice of demand of that date from the fourth defendant's solicitor to the plaintiff! There is also no evidence that the plaintiff had gone to see Tetuan RV Lingam & Co on 2 November 2000 to seek advice on the notice of demand he received from the fourth defendant's solicitors. Could Tetuan RV Lingam & Co have acted so fast in writing the letter to the fourth defendant's solicitors? What is more interesting to note is that the plaintiff, under cross-examination had testified that after he knew that Encik Rajan (ie the third defendant's director who had approached the plaintiff for the sale and purchase of the land) had connection with Tetuan RV Lingam & Co, the plaintiff stopped contacting RV Lingam. For a full and proper appreciation of the evidence surrounding the plaintiff's involvement with Tetuan RV Lingam & Co, notes of proceedings (at pp 95–97 of the appeal record *Jilid* 2) on the cross-examination of the plaintiff by the first and second defendants' counsel are reproduced below:

Q: Encik terkejut apabila menerima notis daripada Tetuan Soo Thien Ming & Nashrah (P6), p 101. Bulan November 2000. Adakah betul selepas terima surat ini, encik telah melantik peguam untuk membayar surat-surat itu?

A: Saya pergi minta nasihat daripada peguam Tetuan R.V. Lingam & Co.

Q: Adakah betul bahawa Tetuan R.V. Lingam & Co telah atas arahan encik menjawab kepada surat-surat daripada Tetuan Soo Thien & Nashrah melalui surat bertarikh 2 November 2000 di mukasurat 122.

A: Saya tidak tahu. Tetuan R.V. Lingam & Co bagitahu bahawa akan siasat tetapi tidak tahu R. V. Lingam ada jawab surat.

Q: Adakah betul bahawa encik tidak pernah memberi arahan kepada R.V. Lingam untuk mengisukan surat itu?

A: Saya suruh siasat kes ini, tetapi tidak suruh jawab surat ini.

Q: Di dalam keterangan encik bahawa encik tidak sedar tentang surat ini?

A: Tidak sedar. Selepas saya dapat tahu bahawa Encik Rajan ada kaitan dengan Tetuan R.V. Lingam & Co., saya tidak hubungi R. V. Lingam lagi.

Q: Saya akan merujuk kepada jawapan di mukasurat 45 hingga 49. Ikatan

Pliding Lampiran 17. Para 3. Dalam jawapan ini, peguam encik tidak menafikan bahawa surat tersebut telah dihantar. Jadi encik tahu atau tidak surat itu wujud?

A: Betul.

Q: Saya cadangkan bahawa kandungan surat ini mencerminkan keadaan yang betul dan awak telah beri cagaran kepada bank?

A: Tidak setuju.

Q: Surat daripada Tetuan R. V. Lingam & Co menyatakan bahawa encik adalah dalam proses untuk menjual tanah kepada seorang pembeli lain pada masa itu, betul?

A: Tidak betul.

Q: Di dalam surat tersebut, Tetuan R.V. Lingam & Co memohon statement daripada bank tentang jumlah yang perlu dibayar di bawah cagaran?

A: Saya tidak pernah pohon untuk apa-apa pinjaman di bank. Saya hendak tahu further details of the loan.

Q: Menurut surat ini, encik mengakui bahawa terdapat satu charge. Encik memohon untuk jumlah yang terhutang oleh encik dan menyatakan bahawa encik menjual tanah kepada seorang pembeli yang lain. Saya cadangkan isu kandungan surat ini adalah betul?

A: Kandungan surat ini adalah tidak betul.

Q: Saya katakan surat yang ditulis oleh Tetuan R. V. Lingam & Co adalah atas arahan yang diberikan oleh encik kepada Tetuan R.V. Lingam?

A: Saya tidak beri arahan kepada Tetuan R.V. Lingam Co untuk tulis surat tersebut.

[39] In this case the plaintiff gave evidence by way of witness statements. In his witness statements, the plaintiff stated that he signed several documents at the first and second defendants' office at Taman Maluri Cheras Kuala Lumpur. But the plaintiff said no explanation was given to him by the first and second defendants about the documents and he was simply asked to sign at the signature column only. The plaintiff admitted signing exhs P1, P2, P3, P4 and P5. But he said that when he signed he just followed the instruction by the first and second defendants who said that the documents had to be signed for the sale transaction and the transfer of the said land to the third defendant. The plaintiff also testified that the first and second defendants were the common solicitors for himself and the third defendant, that is for the vendor and the purchaser.

[40] The plaintiff also said in his witnesss statements that he was represented by the first and second defendants in the transaction and that he is not conversant in English or Bahasa Melayu. In fact he gave evidence in Tamil. The

plaintiff said he is not educated and relied on the first and second defendants. The plaintiff also said that the sale and purchase agreement was in English.

[41] In his witness statement the plaintiff also states that when he signed the documents it was at the instance of the first defendant and in the presence of a lady ('DW3') who was representing the second defendant; and at the time when he signed the documents the plaintiff said 'borang-borang ini kosong'. The plaintiff further said that after his solicitors Tetuan Sivaraja & Co explained to him then only he knew that the 'borang' were 'borang gadaian' for security for loans given to the third defendant by the fourth defendant. The plaintiff further testified in QA 16 his witness statement that if he was informed at the time of signing that the *borang* were *borang gadaian*, he would not have signed it. The plaintiff said that he never wanted to take any loan from the fourth defendant and that he 'tidak kena mengena dengan Defendant Ketiga'. The plaintiff said 'Defendant Ketiga beli tanah tersebut dan saya, mengapa saya perlu gadai tanah saya'.

[42] The plaintiff also testified that he was never a director of the third defendant and neither was he a shareholder in the third defendant. The plaintiff said he never gave any instruction to the first or second defendants to prepare the charge security documents for the loans in favour of the fourth defendant and had never agreed to charge the land as security for the loans by the fourth defendant to the third defendant. There was also no consideration for the purported charge of the land by the plaintiff to the fourth defendant.

[43] The plaintiff testified that he never received any loan from the fourth defendant and was not aware of any facilities or loan given by the fourth defendant to the third defendant.

[44] When cross-examined by learned counsel for the first and second defendants, the plaintiff denied having any other land from the one that is the subject matter of this case. When challenged as to his educational background, the plaintiff said that never went to school, not even a single day.

[45] With regard to the sale and purchase of the said land to the third defendant, the plaintiff under cross-examination testified that Encik Rajan, one of the directors of the third defendant, whom he knew through a land broker, came to see him in early 1999 and expressed interest to purchase the land. The plaintiff said the third defendant proposed terms of payment as follows: RM100,000 for the first month, RM100,000 for the second month and RM10,000 for the third month and for every month for the next 35 months — making a total of RM550,000 which is the purchase price stated in the sale and purchase agreement. We pause here to observe that would a reasonable vendor agree to such terms of payment under a normal

circumstances when he is not under any pressure to sell and could have received the full purchase price in two instalments — say 10% as deposit and the balance of the purchase price in full upon execution of the sale and purchase agreement or upon the execution of the memorandum of transfer. The inference that we can draw from this evidence is that the plaintiff could have been sweet-talked into agreeing to such terms either by the third defendant or the first and second defendants; and this evidence goes to show and emphasises the plaintiff's level of literacy regarding the whole transaction. Encik Rajan was never called to testify. The plaintiff say he do not know the whereabout of Encik Rajan.

[46] Another piece of evidence which points to a probable scheme to persuade the plaintiff to depart with his land with no real intention on the part of the third defendant to seriously perform its part of the bargain under the sale and purchase agreement is the payment cheque. On the payment, the plaintiff testified under cross-examination (at pp 93–94 of the appeal record *Jilid* 2) as follows:

Q: Encik telah menyatakan bahawa encik hanya menerima RM140,000.00 sebagai pembayaran, betul?

A: Mula-mula saya terima 2 cek. RM50,000.00 setiap satu tetapi diberhentikan. Tetapi kemudian dapat 2 cek. Dan setiap satu RM80,000.00 dan RM20,000.00. Selepas itu 4 hingga 5 bulan bagi cash, RM5,000.00 dan RM10,000.00.

Q: Bilakah kali pertama encik menerima wang daripada Defendan Ketiga dan berapakah jumlahnya?

A: Selepas menandatangani perjanjian tersebut tetapi tidak ingat tarikh.

Q: Pada kali pertama encik menerima, berapakah keping cek dan berapakah jumlahnya?

A: Kali pertama, 2 cek. Setiap cek mengandungi RM50,000.00 tetapi Defendan suruh jangan cash. Dibayar atas nama saya.

Q: Siapa yang menyuruh encik supaya jangan cashkan cek tersebut?

A: Yang menyuruh saya jangan cashkan cek tersebut ialah Encik Rajan. Di pejabat Encik Rajan.

Q: Bila Encik Rajan jangan cashkan, jadi apa yang encik buat dengan cek tersebut?

A: Encik Rajan bagitahu bahawa dia akan bagi cek yang baru. RM80,000.00 dan RM20,000.00.

Q: Pada kali kedua, bilakah Encik Rajan memberikan cek-cek tersebut?

A: Lebih kurang sebulan, selepas 2 cek yang pertama.

Q: Adakah encik berjaya cashkan cek tersebut?

A: 2 cek kedua - dapat dicashkan cek itu. RM100,000.00. Selepas itu, dia bagi cash, RM5,000.00, RM10,000.00, RM5,000.00 dan kemudiannya dapat RM40,000.00 lebih kurang 4 hingga 5 bulan cash.

Q: Perjanjian tersebut telah ditandatangani pada awal tahun 1999. Adakah betul bahawa pembayaran yang terakhir oleh Defendan Ketiga (Encik Rajan) adalah lebih kurang pada akhir tahun 1999?

A: Tidak ingat.

Q: Defendan Ketiga tidak ikut terma-terma perjanjian?

A: Ya. Pada masa itu company tutup. Pada masa itu tidak dapat dihubungi.

[47] It is observed that Encik Rajan had approached the plaintiff for the purchase of the land in early 1999, and the sale and purchase agreement for the land was executed on 27 January 1999. But by end of 1999 the plaintiff testified that the third defendant company had closed and the plaintiff did not receive any further payment of the purchase price except the amount of RM140,000 received earlier.

[48] In their memorandum of appeal the first and second defendants, as one of their grounds of appeal (ie ground No 3), complained that the learned trial judge erred in law and fact in failing to consider the evidence of an independent witness, an advocate and solicitor ('SD2') whereby the evidence disclosed that the plaintiff was aware that he created a charge in favour of the fourth defendant and had instructed SD2 to write to the fourth defendant asking for time to pay the balance sum owing under the said charge. We observe that the reference to SD2 as the independent witness in ground No 3 of the memorandum of appeal is wrong; it could probably be a mistake or a typographical error. We think that the appellants are referring to SD1 as the independent witness. SD2 is the first defendant and is not an independent witness.

[49] SD1 is RV Lingam of Tetuan RV Lingam & Co. The first and second defendants relied quite heavily on SD1 testimony to show that the plaintiff is not as naive or ignorance as the plaintiff claimed to be regarding land transactions including creating of charges over land as security for loans. In his examination-in-chief SD1 testified that the plaintiff had entered into another sale and purchase agreement with SD1's client to sell a property, and that is how SD1 came to know the plaintiff. SD1 testified that in that transaction he acted for the buyer and had prepared the sale and purchase agreement on 16 October 2000. The copy of the agreement was marked by the court as exh D2.

[50] SD1 testified that property under the sale and purchase agreement (exh D2) was charged to Standard Chartered Bank by the plaintiff, the vendor and it was charged before the date of the agreement. SD1 further testified that the

sale did not go through although he had entered a caveat on the said property on behalf of the buyers — according to SD1 there were three purchasers for the said property.

[51] However under cross-examination by learned counsel for the plaintiff, SD1 testified and agreed that the sale and purchase agreement which he prepared for the said property was later in time (being dated 16 October 2000) compared to the sale and purchase agreement between the plaintiff and the third defendant which was dated 27 January 1999 for the land which is the subject matter of this appeal. He also agreed that the sale and purchase agreement of 16 October 2000 does not involve the same property.

[52] We noted that in his testimony during examination-in-chief, SD1 did not state the specifics as to the property under 16 October 2000 agreement. He merely referred to the schedules to the agreement. SD1 also did not testify as to what happened to the transaction after the purchasers did not come back. Was the agreement concluded and the property transferred to the purchasers? In any event we are of the view that this evidence is irrelevant to the present appeal. The present appeal is about the sale and purchase of the land in Kapar between the plaintiff and the third defendant which ended up with the land being charged to the fourth defendant as security for loans given to the third defendant by the fourth defendant and which charges the plaintiff has denied.

[53] The first defendant, who gave evidence as SD2, and DW3 the conveyencing clerk in the second defendant's firm, testified that the relevant documents in this case were signed by the plaintiff at the second defendant's office. A point to note is that the sale and purchase agreement was dated 27 January 1999 but according to SD2 it was signed at the second defendant's firm on 25 January 1999. This shows that when the sale and purchase agreement (exh P1) was signed the date was left blank. This fact contradicts the evidence by DW3 that when the plaintiff signed the relevant documents, she had filled in and typed all the relevant documents before asking the plaintiff to sign them. It is also noted that the first defendant had testified under cross-examination that he agrees with the suggestion by learned counsel for the plaintiff that it is not stated anywhere at all in exh P1, the sale and purchase agreement of 27 January 1999 that the plaintiff agreed to charge a piece of land in Kapar to secure banking facilities for anyone (see p 120 of the appeal record *Jilid* 2). It also noted from the evidence of DW3 that the charge was signed by the plaintiff on the 28 January 1999, that is after the sale and purchase agreement had been executed by the plaintiff. The question therefore is why would the plaintiff agree to create the charge as security for the loan granted by the fourth defendant to the third defendant when the third defendant had already decided to purchase the land and the plaintiff had signed the sale and purchase agreement! However SD2 and DW3 testified that they had explained the

documents to the plaintiff in Bahasa Malaysia when the plaintiff signed them. DW3 admitted that she is not conversion in Tamil and that plaintiff could understand Bahasa Malaysia though it is 'bahasa pasar'. DW3 also testified that she met the plaintiff only once in the course of preparing and signing of the documents at the second defendant's office.

[54] We have read meticulously the appeal records in this case and we have also given, and with great anxiety, our utmost consideration to learned counsel's written and oral submissions in this appeal, and we are of the view that the issue in this appeal is the credibility of the witnesses that had given evidence before the trial judge and supported by the contemporaneous documentary evidence. In this regard we are mindful that the learned trial judge has had the advantage of seeing and observing the demeanour of the key witnesses giving evidence. In our view, the trial judge was in a better position to assess the credibility of the witnesses. On this point we noticed that the learned trial judge in his short written judgment had made a finding that he believed and preferred the plaintiff's version to that of the defendants. We must respect that finding and as appellate court we should be slow to disturb it. In *Lim Chee Holdings Sdn Bhd v RHB Bank Bhd (formerly known as Kwong Yik Bank Bhd)* [2005] 6 MLJ 497; [2005] 4 CLJ 305, the court said:

> The general rule is that an appellate court should be slow in interfering with the findings of fact of a trial court. It is only when such finding is clearly erroneous in that it cannot be sustained and supported by the evidence adduced that an appellate court may find it necessary to intervene and substitute its own finding. But even in such a situation a distinction has to be made between a finding of a specific fact which depended upon the credibility of witnesses and a finding of fact which depended upon inferences drawn from other facts. In the latter case, an appellate court would be more ready to interfere with the trial judge's findings of fact and form an independent opinion than in the case of the former since it would be in an equally good position as the trial judge to make the determination.

[55] On the facts and circumstances of this case, we think that the learned trial judge is justified in his assessment and conclusion of the the facts and the credibility of the witnesses.

[56] We say that this case is very much determined by the credibility of the witnesses' testimonies because the narration of the events by the plaintiff and the first defendant are completely opposite. The issue therefore is who to believe? This is where the finding and conclusion of facts by the learned trial judge is so crucial. In *Fusing Construction Sdn Bhd v Eon Finance Bhd & Ors* [2000] 3 MLJ 95; [2000] 3 CLJ 341, the court said:

> Since it was a finding of pure facts based on the credibility of witnesses to decide whether there was ample evidence to establish the creation of an express trust, the appellate court is always very reluctant to disturb such findings of facts.

[57] One last issue we need to address is the issue of fraud. The plaintiff contends that the first and second defendants had perpetrated fraud on him as to the sale and purchase of the land. The defendants however deny the contention.

[58] It is settled law that fraud in civil cases has to be proved beyond reasonable doubt and the party to prove it is the party that asserts fraud. On the totality of evidence in this case we are of the view that the plaintiff has discharged that burden.

[59] We observed that in this case the issue of fraud is interwoven with the plea of *non est factum*. On the evidence as found in the appeal records we are satisfied that the plaintiff was, at the time he signed the documents relating to the charges, mistaken as to their character thinking that the documents he signed were necessary for the purpose of the sale and purchase agreement of the land as told to him by the first defendant. Thus, we agree with the learned trial judge's conclusion that the plaintiff has successfully proved the plea of *non est factum*. In *Soo Boon Siong @ Saw Boon Siong v Saw Fatt Seong and Soo Hock Seang (as estate representative Soo Boon Kooi @ Saw Boon Kooy (deceased)) & Ors* [2008] 1 MLJ 27 at p 29; [2008] 1 CLJ 365 at p 388, the court accepted that defence of *non est factum* is available to the appellant 'not merely on the ground of fraud, where fraud exits, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended'.

[60] Similarly in this appeal, the plaintiff's mind was not addressed to the character and the specific nature of the documents relating to the charges that he was asked to sign by the first defendant and DW3, the conveyancing clerk at the office of the second defendant.

[61] Accordingly, we dismiss the appeal with costs and costs is fixed at RM10,000 and RM5,000 to be paid by the appellants to the first and second respondents respectively, with further order that the deposit be paid to the first respondent on account of costs.

Appeal dismissed with costs.

Reported by Afiq Mohamad Noor